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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 404

WISCONSIN ELECTRIC POWER COMPANY,
Appellant,

vs.

CITY OF MILWAUKEE, a Municipal Corporation
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

In compliance with Rule 16 of the Revised Rules of the Supreme Court of the United States, appellant submits herewith its brief in opposition to the Motion to Dismiss filed by the appellee City of Milwaukee in this appeal.

QUESTION PRESENTED ON MOTION

Does the Supreme Court of the United States have jurisdiction to consider a substantial federal question determined by the Supreme Court of Wisconsin in affirming an order sustaining appellee's demurrer to appellant's

complaint where appellant then amends its complaint and appellee's demurrer to such amended complaint is sustained by the lower court upon which judgment is entered dismissing appellant's amended complaint and action, and on appellant's appeal to the Supreme Court of Wisconsin from such final judgment that court adheres to its decision on the first appeal as becoming the law of the case?

STATEMENT

A complete statement of the pertinent facts is set forth in appellant's Statement as to Jurisdiction previously filed with this Court in this appeal. In addition appellant wishes to point out that appellee's Statement in its Motion to Dismiss is not accurate or complete. Appellant did not, as there stated, take a statutory appeal to the Circuit Court for Milwaukee County from the special assessments levied by appellee against appellant's right of way. Appellant could not do this because it did not become aware of such assessments until the time for appeal from such assessments had run out, the notices of hearing of such assessments being given by publication only. Instead appellant commenced an action in the Circuit Court for Milwaukee County to have said assessments be adjudged null and void, alleging in its complaint that the notices of hearing of such assessments by publication only were inadequate to comply with the requirements of due process of law.

ARGUMENT

I.

The Supreme Court of the United States Has Jurisdiction to Consider the Substantial Federal Question Determined by the Supreme Court of Wisconsin on Appellant's First Appeal to That Court.

Appellee, City of Milwaukee, erroneously argues that the substantial federal question determined by the Supreme Court of Wisconsin on appellant's first appeal to that court from an order sustaining appellee's demurrer to appellant's complaint, which was reported in 263 Wis. 111, 56 N.W. 2d 784, is not properly before this Court because on appellant's second appeal to the Supreme Court of Wisconsin following the entry of judgment dismissing appellant's amended complaint and action after appellee's demurrer to said amended complaint was sustained by the lower court, the Supreme Court of Wisconsin adhered to its decision on the first appeal applying the rule of the law of the case. Appellee in effect contends that the Supreme Court of the United States does not have jurisdiction to consider the substantial federal question determined in the earlier stages of the litigation, but is restricted to a review only of such federal questions which were actually decided by the Supreme Court of Wisconsin on appellant's second appeal to that court. The complete answer to this contention is that the appellant could not have appealed to the Supreme Court of the United States from the decision of the Supreme Court of Wisconsin on the first appeal because that decision merely affirmed an order sustaining a demurrer which was not a "final" judgment or decree, one of the essentials for review by this Court. 28 USC § 1257. *Missouri & Kansas Interurban Railway Company v.*

City of Olathe, 222 US 185; *Clark v. City of Kansas City,* 172 US 334.

Being fully aware of this, appellant amended its complaint after the determination by the Supreme Court of Wisconsin on the first appeal, and, after appellee's demurrer to said amended complaint was sustained, appellant allowed a final judgment to be entered dismissing said amended complaint and its action upon the merits in the Circuit Court for Milwaukee County, which judgment the Supreme Court of Wisconsin affirmed on the second appeal. Appellant then invoked the jurisdiction of this Court as soon as the Supreme Court of Wisconsin denied appellant's motion for rehearing following the second appeal. Hence appellant appealed to this Court at the first opportunity open to it.

The record before this Court clearly demonstrates that appellant alleged that appellee's notices of hearing of special assessments by publication only were not adequate to comply with the requirements of due process of law in its initial pleading, and that appellant has consistently alleged such constitutional objection at all subsequent stages of the proceedings. The record also discloses that the Supreme Court of Wisconsin in its decision on the first appeal (263 Wis. 111, 56 NW 2d 784) expressly ruled on appellant's contention as follows:

> "*Per Curiam.* Mr. Justice Fairchild having taken no part in the decision upon this appeal, and the other members of the court being equally divided on the question whether the order sustaining the demurrer should be affirmed or reversed, Mr. Chief Justice Fritz, Mr. Justice Brown, and Mr. Justice Currie being of the opinion that the order should be reversed upon the ground that under the rule of Mullane v. Central Hanover B. & T. Co., 339 US 306, 70 Sup. Ct. 652, 94 L ed 865, the notices of

> hearing given by publication only as required by the provisions of the charter of the city of Milwaukee were inadequate to comply with the requirements of due process, and Mr. Justice Martin, Mr. Justice Broadfoot, and Mr. Justice Gehl being of the opposite view and that the order should be affirmed, the order is affirmed under the rule."

The Supreme Court of the United States is not deprived of its jurisdiction to consider this substantial federal question merely because on the second appeal the Supreme Court of Wisconsin applied the rule of the law of the case. If such were true a substantial federal question could be decided by a State Supreme Court in the earlier stages of the proceedings which could not be reviewed by the Supreme Court of the United States merely because the State Supreme Court would apply the law of the case to later determinations by it in the matter. This Court has repeatedly declared that such is not the law. Recently in *Reece v. Georgia* — US —, 100 L ed *109, Mr. Justice Clark speaking for the Court said (100 L ed *112):

> "At the outset the State contends that the case is not properly before us because petitioner did not apply for a writ of certiorari within 90 days after the first judgment of the Supreme Court of Georgia. This contention is clearly without substance. A timely application for certiorari to review the second judgment was made, and the case is properly here. 28 USC § 1257. We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, Urie v. Thompson, 337 US 163, 172, 173, 93 L ed 1282, 1293, 1294, 69 S Ct 1018, 11 ALR 2d 252, and our right to reexamine such questions is not affected by a ruling that the first decision of the state court became the law of the case, Davis v. O'Hara, 266 US 314, 69 L ed 303, 45 S Ct 104."

In *Urie v. Thompson,* 337 US 163, Mr. Justice Rutledge, speaking for the Court, said (pages 171-173):

"We may readily dispose of another preliminary question concerning the issues which are now properly before us. Respondent argues, somewhat surprisingly, that the sufficiency of petitioner's original claim for negligence involved in the first appeal is not properly here, since it was neither raised nor considered on the second appeal to the Missouri Supreme Court. The short answer is that petitioner has brought the claim to this Court at his first opportunity; and it was not necessary for him to relitigate that claim a second time through the state courts in order to preserve it for our consideration on review of the final judgment rendered in the cause.

"From the opinions of the state supreme court we know judicially that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner had stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute. 28 USCA § 344(b) (now § 1257(3)).

"Although the Missouri Supreme Court's disposition of the first appeal precluded review here at that time of the ruling adverse to petitioner, Urie did not waive that question by amending his complaint, in conformity with the court's mandate, to state his claim more specifically in terms of the Boiler Inspection Act or by proceeding with trial on that theory. As the case then stood, this was his only remaining chance for success unless he was to waive it, ask for final judgment to be entered against him on the general negligence issue, and rely solely upon

securing review of that judgment and reversal by this Court.

"Whatever the effect of the state supreme court's ruling for further proceedings in the state courts, it could not impose such an alternative upon petitioner. Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. Zeckendorf v. Steinfeld, 225 US 445, 454, 56 L ed 1156, 1162, 32 S Ct 728; Messenger v. Anderson, 225 US 436, 444, 56 L ed 1152, 1156, 32 S Ct 739. Even so, we think sound practice would see to it that such questions were expressly preserved in the later stages of review. But, as this Court has had occasion heretofore to observe, its power to probe issues disposed of on appeals prior to the one under review is, in the last analysis, a 'necessary correlative' of the rule which limits it to the examination of final judgments. Louisiana Nav. Co. v. Oyster Commission, 226 US 99, 102, 57 L ed 138, 140, 33 S Ct 78.[12]

(footnote 12) If it were otherwise, our corrective hand could be stayed by any local procedure which chose to resolve all substantial federal questions in an intermediate phase of litigation. The present case lends point to language used by this Court in dismissing a writ of error to a state court for lack of a final judgment: 'When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the (state) Supreme Court * * * as laying down the law of the case, this court will not be thus bound.' Grays Harbor Logging Co. v. Coats-Fordney Logging Co. (Washington

> ex rel. Grays Harbor Logging Co. v. Superior Court), 243 U.S. 251, 256, 257, 61 L ed 702, 705, 706, 37 S Ct 295. Accordingly, even if it were assumed that no federal question of substance was decided on the second appeal and that the 'basis for our jurisdiction must be found, if at all, in the decision and opinion of the state supreme court upon a prior appeal in the same case,' petitioner Urie has 'invoked the jurisdiction of this court at the first opportunity open to (him), and the federal question, having been considered by the state supreme court, is properly here.' Gant v. Oklahoma City, 289 US 98, 100, 77 L ed 1058, 1060, 53 S Ct 530. See, generally, Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col L Rev 1002, 1007, 1016."

See also *United States v. United States Smelting R. & M. Co.,* 339 US 186, 198, 199.

The cases cited by appellee in its Motion to Dismiss do not apply to this question.

CONCLUSION

The federal question on this appeal is substantial and of great importance. Appellant maintains that appellee's Motion to Dismiss should be denied because it is clearly without substance or merit.

Respectfully submitted,

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